

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DIANNE KELLEY and KENNETH HANSEN,) No. C 07-475 MJP
))
 Plaintiffs,) DECLARATION OF
) NICHOLAS J. PSYHOGEOS IN
v.) SUPPORT OF MICROSOFT'S
) MOTION TO SEAL
MICROSOFT CORPORATION, a Washington) CONFIDENTIAL DOCUMENTS
corporation,))
 Defendant.) **Note on Motion Calendar:**
) October 5, 2007
)

I, NICHOLAS PSYHOGEOS, hereby declare as follows:

1. I am employed by Microsoft Corporation (“Microsoft”) at our headquarters in Redmond, Washington. I have been employed by Microsoft since 1998. My current position at Microsoft is General Manager of the Worldwide OEM Programs & Policy team. I have held that position since April 2005. I am over 18 years of age. I have personal knowledge of the facts set forth herein, except as to those facts where I state that my understanding is based on information available to me as General Manager of Microsoft’s Worldwide OEM Programs & Policy team.

2. In my position as General Manager of the Worldwide OEM Programs & Policy

DECLARATION OF NICHOLAS J. PSYHOGEOS
IN SUPPORT OF MICROSOFT'S MOTION TO SEAL
CONFIDENTIAL DOCUMENTS (NO. C07-475 MJP) – 1

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, Washington 98101
(206) 622-3150 Fax: (206) 757-7700

1 team, I am responsible for managing Microsoft's programs, licensing and policies with the
 2 companies (called "original equipment manufacturers" or "OEMs") that manufacture
 3 computers that have Microsoft operating systems and other software preinstalled on them
 4 under one or more licenses from Microsoft or an affiliate.

5 3. I understand that the plaintiffs in this lawsuit submitted copies of the following
 6 confidential agreements, communications and other materials with Plaintiffs' Reply in
 7 Support of Motion to Compel Discovery and to Deem Certain Requests for Admission
 8 "Admitted" (hereafter "Plaintiffs' Reply"):

- 9 • Excerpts of the Rule 30(b)(6) Deposition Transcript of Christine
 10 Mullaney Sundlie in this case in which plaintiffs' counsel
 11 questioned Ms. Mullaney Sundlie about (i) incentive discounts and
 12 compliance with milestones under Microsoft's Market Develop-
 13 ment Agreements with OEMs and (ii) terms of Microsoft's
 14 Designed for Microsoft Windows and Windows Vista Logo
 15 License Agreement with OEMs.
- 16 • Excerpts of Microsoft's OEM Marketing Bulletin, dated September
 17 20, 2006, concerning the "Windows Vista Capable" program.
- 18 • Excerpts from a draft Cooperative Market Development Agreement
 19 between Microsoft and one of our OEM partners.
- 20 • A letter, dated December 27, 2001, from Microsoft to another OEM
 21 partner concerning incentive discounts under a Cooperative Market
 22 Development Agreement between Microsoft and that OEM.
- 23 • Excerpts from a Microsoft Desktop Operating System License
 24 Agreement for OEM Customers.

25 4. Each of these materials is, or contains information about, a commercially
 26 sensitive business matter, and each is of significant competitive value to Microsoft. As such,
 27 Microsoft considers these materials confidential and takes steps to keep these materials
 confidential. Each of the four business documents is labeled "Confidential" on each page of
 the document.

28 5. Maintaining the confidentiality of these agreements and communications with

1 our OEM partners is not simply a matter of great importance to Microsoft. The OEMs also
2 have contractual rights to confidentiality under these agreements, and, based on information
3 available to me as General Manager of Microsoft's Worldwide OEM Programs & Policy
4 team, I understand that OEMs expect Microsoft to keep these matters confidential.

5

6 **Cooperative Market Development Agreements**

7 6. Three of the items described above relate to Microsoft's business practice of
8 negotiating and entering into Cooperative Market Development Agreements with OEMs that
9 are licensed to preinstall Microsoft's operating system software on the personal computers
10 ("PCs") they manufacture and sell. Since most of Microsoft's desktop operating system
11 software is licensed to consumers as a preinstalled component of a PC, Microsoft and the
12 OEMs that preinstall its software have a common interest in promoting the sales of PCs that
13 contain the software and in improving the experience of consumers who buy such PCs.

14 7. A Cooperative Market Development Agreement is a contract between Microsoft
15 and an OEM under which the OEM can obtain specific discounts (called "incentive
16 discounts") on the royalties it pays by successfully completing a series of technical and
17 marketing activities (called "milestones") during a set period of time. These activities are
18 designed to enhance end-user customer experiences by improving product quality and
19 customer support and by promoting promising technologies.

20 8. Microsoft is required (by a consent decree with the U.S. Department of Justice)
21 to have certain uniform terms in certain of its contracts with OEMs. However, Microsoft does
22 not divulge the terms of those contracts (including the uniform terms) to its software competi-
23 tors or to the public. The terms of any Cooperative Market Development Agreement between
24 Microsoft and an OEM—including the details of the incentive discounts that the OEM can
25 earn—are uniform among the OEMs that acquire operating system software directly from

1 Microsoft, but those terms are confidential between Microsoft and those OEMs and are not
2 divulged to the public. In addition, the amounts of the actual discounts that an OEM's efforts
3 earn it under the Cooperative Market Development Agreement are not divulged to other
4 OEMs or to the public. Microsoft considers these matters very confidential.

5

6 **Other Contracts With OEMs**

7 9. The materials submitted with Plaintiffs' Reply also contain (a) excerpts from a
8 Microsoft Desktop Operating System License Agreement for OEM Customers and (b) deposi-
9 tion testimony about Microsoft's Designed for Microsoft Windows and Windows Vista Logo
10 License Agreement with OEMs. Microsoft likewise considers these contracts commercially
11 sensitive business matters and takes steps to keep these materials confidential.

12 10. The Microsoft Desktop Operating System License Agreement for OEM
13 Customers is the license agreement that Microsoft enters into with an OEM that authorizes the
14 OEM to preinstall specified Microsoft operating system software on the PCs the OEM
15 manufactures and sells. Although Microsoft is required (by a consent decree with the U.S.
16 Department of Justice) to have certain uniform terms in this Desktop Operating System
17 License Agreement, Microsoft does not divulge the terms of these software licensing
18 contracts (including the uniform terms) to its software competitors or to the public.

19 11. The Designed for Microsoft Windows and Windows Vista Logo License
20 Agreement with OEMs is a contract under which Microsoft specifies criteria under which
21 OEMs may use particular Microsoft-created logos on or in connection with the PCs the OEMs
22 manufacture and sell. Microsoft does not divulge the terms of this logo license agreement to
23 its software competitors or to the public.

The OEM Marketing Bulletin

12. Plaintiffs have also submitted excerpts from Microsoft's OEM Marketing Bulletin, dated September 20, 2006, concerning the "Windows Vista Capable" program. This is a document that Microsoft created to explain, in detail, to its OEM partners the marketing strategy behind its "Windows Vista Capable Program" and the specific steps and guidelines Microsoft had developed to implement that program. This document was made available only to the OEM partners who were eligible to participate in the "Windows Vista Capable" program, and was provided to those OEMs under a non-disclosure agreement. A footer on each page of the document states: "Microsoft – OEM Confidential – Subject to NDA." Microsoft does not disclose this and other documents detailing its marketing strategies to its software competitors or to the public.

Microsoft's Efforts to Maintain the Confidentiality of Its Commercially Sensitive Business Documents

13. It is Microsoft's regular practice to protect certain types of information as confidential. I am familiar with how Microsoft stores and manages access to certain records relating to our relationships with OEMs. In particular, I am personally familiar with how Microsoft stores and manages access to records relating to (a) the various types of contracts we enter into with OEMs and (b) the communications we have with OEMs concerning those contracts, and, based on information available to me as General Manager of Microsoft's Worldwide OEM Programs & Policy team, I understand how Microsoft stores and manages access to records relating to (c) the marketing programs and strategies we develop for our OEM partners to consider and use. Microsoft considers this information confidential, proprietary and trade secret information of significant competitive value and exerts commercially reasonable efforts to preserve the confidential, proprietary and trade secret nature of such information.

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1 14. We exert commercially reasonable efforts to ensure that the terms of our agree-
2 ments with our OEM partners (including those terms that are required to be uniform) are not
3 divulged outside the relationships with our OEM partners. In addition, we exert commercially
4 reasonable efforts to ensure that information concerning the details of each particular OEM's
5 transactions with Microsoft—such as, for example, the actual amount of incentive discounts a
6 particular OEM earns under a Cooperative Market Development Agreement—is not divulged
7 to other OEMs or to the public. This information is maintained in areas not open to the public
8 in locations protected by passwords (for online information) or locked cabinets and/or doors
9 accessible only with company-issued keys held by those with responsibility for protecting this
10 information. Furthermore, this information is available only to Microsoft personnel with a
11 business need for the information and to the particular OEM to which the information
12 pertains. Divulging this information in a public forum would create a serious and imminent
13 threat of Microsoft's competitors misusing and gaining unfair advantage from our confidential
14 information, and it would also harm our interests during future negotiations with OEMs.

15 15. In addition, we exert commercially reasonable steps to keep the details of
16 specific marketing strategies that Microsoft develops for its OEM partners to consider and use
17 in promoting the PCs they manufacture and sell that contain Microsoft software confidential
18 and available only to our OEM partners. We do not want our software competitors to have
19 access to these marketing strategies because we have made a significant investment of time
20 and resources in developing the strategies and we do not want our competitors to take
21 advantage of our efforts. Based on information available to me as General Manager of
22 Microsoft's Worldwide OEM Programs & Policy team, I understand that this information is
23 likewise kept confidential and is available only to Microsoft personnel with a business need
24 for the information and to the particular OEMs who are eligible to participate in the marketing
25 program to which the information pertains. Divulging this information in a public forum

would create a serious and imminent threat of Microsoft's competitors misusing and gaining unfair advantage from our confidential information.

**Disclosure of Microsoft's Confidential Business
Materials Would Cause Significant Harm to Microsoft's Competitive Interests**

16. The public disclosure of the terms of any of Microsoft's agreements with OEMs would put Microsoft at a competitive disadvantage vis-à-vis its software competitors. If those competitors knew the terms to which we were willing to agree with an OEM partner, Microsoft's competitors could use that information in their own negotiations with OEMs. For example, a competitor knowing the terms to which Microsoft was willing to agree with an OEM partner could provide more favorable terms to that OEM or to other of our current or potential OEM partners. In that case, Microsoft could see its business with one or more OEMs decline, and it could be forced to renegotiate its agreements with one or more OEMs on less favorable terms—all to Microsoft's competitive disadvantage in the marketplace.

17. In addition, the public disclosure of the details of marketing strategies that Microsoft has developed for use by its OEM partners—such as the marketing strategies set out in the OEM Marketing Bulletin for the “Windows Vista Capable” program—would also put Microsoft at a competitive disadvantage vis-à-vis its software competitors. If those software competitors knew the details of marketing strategies that Microsoft had developed for use by its OEM partners, Microsoft’s competitors could use that information in their own marketing programs or could structure their own marketing programs to undercut the effectiveness of the strategies Microsoft had developed—all to Microsoft’s competitive disadvantage in the marketplace.

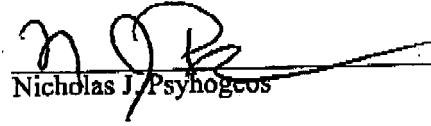
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18. I declare under penalty of perjury that the foregoing is true and correct.
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EXECUTED this 1st day of October, 2007, at Redmond, Washington.
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Nicholas J. Psychogios

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26 DECLARATION OF NICHOLAS J. PSYHOGEOS
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